SUPREME COURT, U. S.

No. 554

# In the Supreme Court of the United States

OCTOBER TERM, 1970

OWSLEY STANLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 524

OWSLEY STANLEY, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 427 F. 2d 1066.

### JURISDICTION

The judgment of the court of appeals was entered on June 1, 1970. A petition for rehearing, with a suggestion for rehearing *en banc*, was denied on July 13, 1970. The petition for a writ of certiorari was filed on August 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether evidence seized pursuant to a search warrant should have been suppressed because of alleged misstatements in a supporting affidavit.

2. Whether consecutive sentences could be imposed for both manufacture and possession of LSD where the possession was for other than personal use.

## STATEMENT

Following a non-jury trial in the United States District Court for the Northern District of California, each of the petitioners was found guilty on all counts of the information in which he was named [1] (Tr. 1164–1169 [2]). Petitioners Stanley, Thomas and Massey were fined $3000 and ordered to be incarcerated for one year on each count (counts 1, 4 and 5), the sentences to run consecutively (S. Tr. 63–66 [3]). Petitioner Spires was fined $3000 and ordered to be incarcerated for one year on each count (counts 1–5), the sentences

[1] Each of the four petitioners was charged in counts 1, 4, and 5 of the information with conspiracy to manufacture, compound, process, sell and deliver LSD in violation of 18 U.S.C. 371 (count 1); unlawful manufacture of LSD in violation of 21 U.S.C. (Supp. V) 331(q)(1), 360a(a) (count 4); and unlawful possession of LSD in violation of 21 U.S.C. 331(q)(3), 360a(c) (count 5). Petitioner Spires was also charged in counts 2 and 3 with sales of LSD in violation of 21 U.S.C. 331(q)(2), 360a(b) (Pet. 6 n. 1). All references to 21 U.S.C. are to the 1965 amendments to the title.

[2] "Tr." refers to the trial transcript which is contained in seven volumes, consecutively numbered and consecutively paginated. A copy of the transcript is being lodged with the Clerk of this Court.

[3] "S. Tr." refers to the transcript of the judgment and sentencing, which is contained in an unnumbered volume. A copy of this transcript is being lodged with the Clerk of this Court.

under counts 1, 2, and 4 to run consecutively and the sentences under counts 3 and 5 also to run consecutively with the sentence imposed under count 1 (S. Tr. 63–64), thus resulting in a total of three years' imprisonment. The court of appeals affirmed.

Since the issues raised by the petitioners do not challenge the sufficiency of the proof at trial, the evidence will not be extensively detailed. In November, 1966, agents of the Bureau of Drug Abuse Control commenced an investigation into suspected illegal drug activities (Tr. 1000). During the ensuing months, they conducted extensive surveillance activities and observed petitioners and others under circumstances indicating that they were engaged in the production and distribution of illegal drugs (Tr. 713–726, 799–803, 857–862, 876–889). During this same period, agent Kenneth Krusko, acting in an undercover capacity, became acquainted with petitioner Spires (Tr. 915–916, 918) and, on two separate occasions, purchased a quantity of LSD from him (Tr. 390–391, 398–399, 428, 432, 921–926, 962, 964–965). Krusko and Spires had frequent conversations, during which Spires revealed that Stanley was engaged in the manufacture and distribution of illicit drugs (Tr. 927–929, 932, 942, 950, 952–954, 961, 970, 972). Spires told the agent that he was helping to find a location for a laboratory and was to engage in the manufacture of drugs at the laboratory (Tr. 940, 952–956, 958, 968–969, 971–972).

On December 8, 1967, Spires reported to Krusko that they were in the process of disbursing the LSD

through the excipients (filler) but that Owsley [Stanley] had not as yet moved the tableting machine into the laboratory (Tr. 972).

On December 19, 1967, agent Krusko asked Spires if he could obtain some "acid." Spires said he had no LSD with him but that he was going up to the laboratory that afternoon and would attempt to procure some. When Krusko inquired whether he could have the LSD by the 21st of December, Spires replied that he was not sure he would be back by that time. Spires also informed agent Krusko that Owsley [Stanley] intended to produce 25 grams of LSD before Christmas (Tr. 973–974).

On December 21, 1967, a group of law enforcement officers executed a search warrant at 69 La Espiral Street in Orinda, California (Tr. 20). At that time, they discovered Stanley, Thomas, Spires and two females (Tr. 22–23). After a cursory examination of the house and observation of laboratory paraphernalia, the occupants were placed under arrest for the manufacture of dangerous drugs (Tr. 42). A more extensive search was then conducted and numerous pieces of laboratory equipment, as well as a quantity of LSD and other chemical compounds, were discovered (Tr. 80–115, 258, 260–273, 282–301, 425, 434–436, 607–609, 670–683, 688–693, 1018–1036, 1044–1046, 1059–1062).

## ARGUMENT

1. Petitioners contend that the evidence seized from the house at 69 La Espiral Street should have been suppressed because of allegedly false statements in

Krusko's affidavit (Pet. 13–18).[4] But even assuming, *arguendo,* that statements in an affidavit may be impeached after a search warrant has issued, this does not help the petitioners here because Krusko's testimony at trial, the pertinent portion of which is set forth in the margin,[5] was not at variance with the statements in his affidavit in any material respect. See *United States ex rel. DeRosa* v. *LaVallee,* 406 F. 2d 807 (C.A. 2), certiorari denied, 396 U.S. 854. In his affidavit, Krusko stated that Spires told him on December 19, 1967, that he would be able to provide "approximately one gram" of LSD (Pet. 7–8); at trial Krusko referred to the quantity as "some" LSD and said that Spires offered to "attempt to obtain" this (Tr. 974). The affidavit relates that Spires told Krusko to contact him on December 21, 1967 (Pet. 8);

[4] The search warrant had issued on the basis of two affidavits submitted by agents Barron and Krusko (Pet. 6). The facts contained in agent Barron's affidavit were essentially identical to those he testified to at trial (Pet. 7, Tr. 301–307).

[5] "I told Mr. Spires that I was going back to New York for Christmas, and asked him if I could obtain some acid to take back with me. He said that at the time he had nothing but he was going up to the laboratory that afternoon and would make an attempt to obtain some LSD for me. I then told him that I had reservations for Thursday evening, which was December 21, 1967, and wanted to know if he would have the LSD by that time. Mr. Spires suggested that I either call or stop by on Thursday because he wasn't sure he would be back by then. So he suggested that I call him from New York over the weekend if I was unable to locate him on Thursday. Mr. Spires said that Owsley intended to produce 25 grams of LSD before Christmas, and after that he was thinking of traveling to England." (Tr. 974.)

[6] He was not asked about the exact amount.

Krusko repeated this at trial (Tr. 974). The affidavit states that Spires would be manufacturing LSD "until at least December 21, 1967" (Pet. 8); Krusko testified that Spires said 25 grams of LSD would be produced before Christmas (Tr. 974). Thus, in substance there is no difference between Krusko's affidavit and his testimony.[7]

2. Petitioners attack their separate convictions and consecutive one-year sentences for both the manufacture and possession of LSD, where possession was merely incidental to manufacture.[8]

The decision of the court below was constitutionally correct in its recognition that manufacture and possession may be treated as separate offenses because each requires proof of a fact which the other does not.[10] *Blockburger* v. *United States*, 284 U.S. 299. Nonetheless, more recent decisions of this Court indicate that even where one act can be said to give rise

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[7] In view of Krusko's knowledge that Spires worked in the laboratory and that manufacture had begun, use of the word "manufacture" in the affidavit represented, at most, a minor discrepancy between what Krusko was told and what he related.

[8] In 1968, the maximum penalties were increased to imprisonment for five years or a fine of $10,000, or both. 21 U.S.C. (Supp. V) 333(b)(1).

[9] Even if petitioners could not be convicted of possession and consecutively sentenced under the facts of this case, this would not benefit petitioner Spires since his 3-year sentence is adequately supported by the consecutive one-year terms imposed under counts 1 (conspiracy), 2 (sale) and 4 (manufacture).

[10] In order to convict the petitioners of the possession charge, it was necessary for the government to prove not only possession but also to prove that such possession was for the purpose of sale, delivery or other disposal to another. 21 U.S.C. 331(q)(3), 360a(c) (1965 amendments).

to two separate offenses, there is still a question whether Congress intended that it be treated as such. *Bell* v. *United States*, 349 U.S. 81; *Gore* v. *United States*, 357 U.S. 386; *Ladner* v. *United States*, 358 U.S. 169. For this reason (and since the statute in question does not, on its face, explicitly answer the question), we have examined the legislative history in an attempt to discover the congressional intent.

The committee report in the House of Representatives indicates that the purpose of the Drug Abuse Control Amendments of 1965 was to provide increased controls over the distribution of barbiturates, amphetamines and other drugs having similar effects. H. Rep. No. 130, 89th Cong., 1st Sess. 1 (1965). The legislation was aimed at "* * * those in the chain of distribution." *Id.* at 3. One method adopted to accomplish this control was outlawing possession of these drugs (other than by the user) outside the legitimate channels of distribution. *Id.* at 1. The committee report describes this prohibition as "* * * a further aid to enforcement." *Id.* at 3. It thus seems that the sections prohibiting possession, 21 U.S.C. 331(q)(3), 360a(c), were intended to establish an alternative method of accomplishing the purpose of the statute—that is, to curtail the distribution of these drugs—and not to increase the penalties of those manufacturing drugs whose possession occurred in the process of manufacture. Consequently, consecutive sentences for both manufacture and possession were not proper in this case where possession was solely incident to manufacture.

## CONCLUSION

For the foregoing reasons, the Court may wish to grant the petition for certiorari for the purpose of remanding the cause to direct vacation of the sentences under the possession convictions of petitioners Stanley, Thomas and Massey. The petition should be denied in all other respects.

Respectfully submitted.

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OCTOBER 1970.

CERTIORARI DENIED
N.C.R.

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